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No. 99-498

Supreme Court, U.S.
FILED
NOV 29 1999
CLERK

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION, *et al.*

Petitioner,

v.

DONNA VIZCAINO, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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November 29, 1999

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LIST OF PARTIES AND RULE 29.6 STATEMENT

There have been no changes in the information previously submitted by Microsoft Corporation, pursuant to Rule 29.6, in its petition for certiorari.

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Rather than address the significant issues of class management and employment law raised by Microsoft's petition, Respondents change the subject, primarily by insisting that Microsoft "conceded" the scope of the class and the common law employee status of all its purported members. Respondents' pleas in avoidance grossly misstate the proceedings below.

First, Microsoft's concession (which the en banc *Vizcaino II* court agreed was arguendo, 120 F.3d at 1010 (A53)) pertained at most to the named plaintiffs and those they represented at the time this case was certified in 1993, i.e., former freelancers. It did not pertain to the thousands of temporary workers who performed services at Microsoft under different conditions during the intervening six years and who, as the District Court so correctly held, were never intended to be part of the class. Even had the concession not been limited, the recent

decision in *Ortiz* v. *Fibreboard Corp.*, 119 S. Ct. 2295 (1999), confirms that no party's agreement can circumvent Rule 23's command that class members share the named plaintiffs' essential traits. *Id.* at 2315 n.24 (noting "the constitutional requirement" that district courts ensure that "'named plaintiffs at all times adequately represent the interests of absent class members'") (quoting *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985)).

Second, because the *Vizcaino II* court ignored the class scope, the issuance of mandamus in *Vizcaino III* creates a rule forbidding District Courts from enforcing Rule 23 after a remand in all cases.

Third, contrary to Respondents' muddled arguments misrepresenting both the record and *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), the decision in *Vizcaino III* allowing dual benefit packages for temporary workers is based on a misinterpretation of the Internal Revenue Code and ERISA and thus presents a question of federal law. Moreover, certiorari is particularly apt because the Ninth Circuit's conclusion, that temporary agency employees presumptively have a common law employment relationship with both their agency and the agency's client permitting them to receive benefits from both, conflicts with the Tenth Circuit's decision in *Roth* v. *American Hospital Supply Corp.*, 965 F.2d 862, 867 (10th Cir. 1992) (holding that an employee has only one employer for purposes of ERISA benefit entitlement).

I.

Vizcaino III Interferes with District Courts' Constitutional Duty to Ensure that Rule 23 Is Satisfied at All Times Before Final Judgment

Because they cannot, Respondents do not directly contest this Court's holdings that a District Court has the

obligation to "adjust the class, informed by the proceedings as they unfold," in order to assure that a class complies with Rule 23's prerequisites. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997). Instead, they resort to semantics and misrepresent the record to convey the false impression that the class certified in 1993 was drastically "reduced" in 1998.

In fact, the opposite is true. Because four years had passed between its class order and remand from the Ninth Circuit — a time of unprecedented expansion in Microsoft's industry — the District Court was faced with a situation in which a class definition meant to encompass a few hundred individuals could now plausibly be read as including many thousands of others not contemplated at the time of certification. The District Court could not have been clearer in ruling that the class was not being "reduced" but instead that it continued to be composed only of those workers who, like the named plaintiffs, had been the subjects of the IRS's rulings.[1] The District Court thus made certain that Rule 23's requirements of commonality and typicality were satisfied, by ensuring that class members "at all times" shared the essential

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[1] *E.g.*, A28 ("This case has always been about a particular group of Microsoft workers . . . who, like all the named plaintiffs, worked as independent contractors between 1987 and 1990"); A38 n.3 ("Clearly, the Court understood the proposed class to consist only of the freelance workers that the IRS determined were Microsoft employees in 1989"). This understanding of the scope of this class is, moreover, explicit in the certification order: the District Court found that the class presented "common issues" because "[t]he Internal Revenue Service has already made a determination that [the class members] are common law employees for tax purposes." (7/21/93 Order at 11.)

characteristics that had qualified the named plaintiffs as class representatives. *Ortiz*, 119 S. Ct. at 2315 n.24.[2]

Unable to contest the substance of these issues, Respondents instead insist that the District Court was barred from enforcing Rule 23 on the theory that the *Vizcaino II* remand constituted "the decision on the merits" within the meaning of Rule 23(c)(1). In doing so, they ignore this Court's holding that the phrase "the decision on the merits" used in Rule 23 means "final judgment." *See Gardner* v. *Westinghouse Broad. Co.*, 437 U.S. 478, 480 n.6 (1978) ("a decision on class-action status may be conditional, subject to alteration or amendment prior to final judgment, F. R. Civ. P. 23(c)(1)") (internal quotation marks omitted). The Ninth Circuit and Respondents are simply wrong in concluding that *Vizcaino II* constituted the decision on the merits within the meaning of Rule 23: in addition to remanding the entire SPP claim without making even a partial determination as to liability, *Vizcaino II* ordered, inter alia, extensive proceedings to determine each putative class members' common law employment status. *E.g.*, *St. Louis, Iron Mountain & S. R.R.* v. *Southern Express Co.*, 108 U.S. 24, 28-29 (1883) (a final judgment "terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined").

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[2] Respondents' suggestion that there are "only various *immaterial* differences" between the former freelancers and the temporary agency workers (Opp'n at 21) ignores the substantial dissimilarities between the two groups outlined in Microsoft's petition. (*See* Pet. at 25 (noting distinctions regarding the method of payment, provision of employee benefits, tax treatment, training, and recruitment).) Microsoft submitted extensive documentation detailing these disparities, contrary to Respondents' false contentions of uncontroverted evidence.

Even more egregious is Respondents' error in contending that the District Court was barred from enforcing Rule 23 because Microsoft purportedly "conceded" that the class encompassed every temporary agency employee who had been or would be assigned to work at Microsoft. (Opp'n at 20.) Not only did Microsoft make no such concession,[3] Rule 23 charges District Courts with the responsibility to protect the interests of absent class members without regard for what the parties agree to. *Ortiz*, 119 S.Ct. at 2316 ("uncritical adoption" of facts "agreed upon by the parties" to demonstrate propriety of class certification "is no substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees'") (quoting *Amchem*, 521 U.S. at 620). Respondents' repetition of the Ninth Circuit's gratuitous supposition that "there is little doubt" that Microsoft would have urged an expansive class scope had it prevailed, *Vizcaino II* at 720 (A13), is not only baseless, it illustrates the wisdom of Rule 23 and *Ortiz*'s rule, which requires the District Court, not one or more self-interested parties, to determine the scope of the class.[4] Thus, even if Microsoft and Respondents had agreed upon a class, that agreement would not affect the District Court's independent duty to

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[3] Respondents misleadingly quote a fragment of a footnote in a prior brief by Microsoft to suggest that Microsoft conceded the class scope. As the sentence in which the footnote reference appears shows, however, Microsoft expressly objected to class treatment of issues such as employment status. (4/19/93 Resp. at 4 ("[if plaintiffs are not precluded from receiving benefits by the fact that they were never offered benefits and actually promised they would not seek benefits,] a separate determination would be required as to (1) Whether each prospective class member was, in fact, a common law employee of Microsoft").)

[4] Furthermore, the hypothesis proves too much, for by parity of reasoning Respondents would have taken the position that the class was as narrow as possible, had they lost.

ensure that Rule 23 is met, right up to the entry of final judgment.

Respondents also fail to confront the negative ramifications of *Vizcaino III*'s expansion of a mandatory class that is without the notice and opt-out protections that safeguard non-mandatory classes. Unable to dispute that the Due Process Clause forbids mandatory class treatment of actions that are "predominately for money damages," *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 n.3 (1985), Respondents argue that *Shutts*'s constitutional protections are inapplicable because of their "pending request for injunctive relief." (Opp'n at 23.) While their 1992 Complaint did request injunctive relief in addition to money damages, in the intervening seven years this case plainly has become one "predominately for money damages," as shown by *Vizcaino II*'s identification of monetary issues for decision on remand. An incidental request for injunctive relief does not save the mandatory class from being constitutionally repugnant.[5]

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[5] Respondents are wrong in claiming that this Court may not address the inappropriateness of mandatory class treatment of this action because Microsoft did not raise this objection below. This class was first created by the Ninth Circuit in *Vizcaino III*, so Microsoft had no opportunity to object previously to its contours. Moreover, Respondents' error is compounded by the Ninth Circuit's rule that such a determination can be reviewed collaterally. *See Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed*, 511 U.S. 117 (1994) (as a matter of due process, an absent member of an improperly certified mandatory class is *not* barred by res judicata from relitigating a claim involving "substantial money damages").

II.

The Ninth Circuit's Holding Makes the Class Definition Part of Every Mandate, and Thus Has Significant Ramifications on All Class Action Litigation

Although Respondents cite several black-letter rules regarding mandate standards, they cannot establish that the prior appeal constituted a ruling on the class definition because, as Microsoft explained in its petition, no fair reading of the mandate draws the propriety of the class into question. Neither *Vizcaino I* nor *Vizcaino II* makes any mention of the class definition other than to recite it verbatim, none of the opinions mentions Rule 23, and the holding of the Circuit Court would have been the same regardless of the scope of the class.

Respondents' attempts to downplay the importance of the Ninth Circuit's abuse of its mandamus powers grossly understate the consequences of the Ninth Circuit's overreaching. If *Vizcaino II* — which makes the barest mention of the class scope — is read to preclude ongoing enforcement of Rule 23, every appellate court remand in a class action will fix in stone the original class certification. Neither the changes in Rule 23(f) nor the eventual availability of appeal softens the blow to enforcement of Rule 23. Consequently, prudent litigants will be compelled to appeal and cross-appeal the issue of class certification at every turn in order to avoid a class definition that may prove unworkable in light of subsequent factual developments. Restated in *Vizcaino III* parlance, all litigants will be forced to file a "contingent cross-appeal" of any class certification, thereby needlessly proliferating appeal issues.[6]

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[6] Respondents do not even attempt to defend the Ninth Circuit's conclusion that Microsoft is barred from contesting the

III.

The Ninth Circuit's Finding that a Temporary Agency Employee Is Presumptively a Common Law Employee of both the Agency and the Agency's Client Is Wrong as a Matter of Federal Law

Even Respondents do not offer support for the Ninth Circuit's conclusion that a temporary agency employee's relationship with the agency is irrelevant to the issue of whether he or she is a Microsoft employee and, consequently, a temporary agency employee is presumptively a common law employee of both the temporary agency and the agency's client. Nor do Respondents endorse *Vizcaino III*'s contravention of the Internal Revenue Code, which provides that temporary agency employees are employees of either the temporary agency *or* the temporary agency's client, I.R.C. § 414(n)(2) — notwithstanding that a purported desire to enforce the Code is the basis of *Vizcaino I* and *II*. (*See* A63, A106) This is hardly surprising because the District Court, Respondents, and Microsoft all agreed that the relevant inquiry was whether the temporary agency *or* Microsoft was the employer. The Ninth Circuit's holding on this issue was entirely sua sponte and sui generis.[7]

Unable to defend on substantive grounds, Respondents seek to shield the Ninth Circuit's holding from review by — once again — retreating to the claim

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propriety of the class certification as a result of Microsoft's failure to take a "contingent cross-appeal" of the certification order.

[7] *See also* Alvin D. Lurie, *Microsoft Re-re-redux: New Twist of the Eternal Triangle*, 84 Tax Notes 143, 147 (1999) (presumptively "the existence of a bona fide employment relationship with Company B would preempt an employment arrangement with Company A as to the identical services").

that, in 1994, Microsoft conceded that it was the common law employer of every temporary agency employee who had worked or ever would work at Microsoft. (Opp'n at 27.) The Ninth Circuit, however, did not find that Microsoft had conceded the issue;[8] it concluded as a matter of substantive law that the temporary agency workers were presumptively Microsoft's employees.

Respondents further claim that the Ninth Circuit's novel principle of employment law is based only on state law and accuse Microsoft of asking this court to create federal common law in violation of *Erie*. To the contrary, the Ninth Circuit's decision regarding class composition construes the term "employee" as used in ERISA, 29 U.S.C.A. § 1002(6), and the Internal Revenue Code, I.R.C. § 423(b)(4), thereby presenting a federal question. Respondents' SPP claim plainly hinges upon their assertion that they are employees within the meaning of ERISA and Microsoft's ERISA plan documents.[9] Similarly,

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[8] Of course Microsoft made no such sweeping concession but again, even if it had, that would not validate the Ninth Circuit's creation of a right to double benefits for employees of temporary agencies. Respondents hedge their concession argument by alternatively suggesting that, in 1994, a Magistrate Judge conclusively determined that Microsoft was the common law employer of every temporary agency employee who had worked in the past or would work in the future at Microsoft. (Opp'n at 2-4.) Apart from the fatuity of the suggestion that the Magistrate Judge undertook *prospectively* the intensely fact-specific inquiry necessary to determine common law employee status, Respondents' argument fails for the simple reason that, because the District Court rejected the portions of the Magistrate Judge's recommendation that included the finding that the members of the class were Microsoft's employees, the recommendation is without effect. (A35 ("This Court adopted Judge Wilson's recommendations only insofar as they favored Microsoft").)

[9] Respondents offer no support for the suggestion that, because the SPP claim was before the plan administrator when

the basis of the Ninth Circuit's decision to construe the ESPP as having been offered to the freelancers is the conclusion that the ESPP "was an offer to employees, *as that term is defined in § 423.*" *Vizcaino II* at 1014 (A63) (emphasis added). *See also Vizcaino I* at 1197 (A106-107). Moreover, the question presented is not only federal, but it is also one on which a split in the circuits exists. *See Roth* v. *American Hosp. Supply Corp.*, 965 F.2d 862, 867 (10th Cir. 1992) (when confronted with two potential employers, pertinent issue is "*whose* employee was [the individual]"). Far from being irrelevant, as Respondents suggest (Opp'n at 25 & n.18), the pendency of other litigation concerning a temporary employee's common law status further shows the importance of the federal issue presented.

Finally, Respondents' observation that temporary agencies do not offer "duplicate ESPP benefits" (Opp'n at 28), while accurate, utterly fails to answer Microsoft's showing that *Vizcaino III* unfairly permits temporary employees to demand two sets of employee benefits for the same work, although regular employees can receive only one. The temporary agencies do provide, inter alia, 401(k) benefits similar to Microsoft's SPP, which is also a 401(k) plan. As noted by the amici, a ruling allowing duplicative receipt of such benefits has wide-ranging implications for all employers who use temporary agency personnel.

CONCLUSION

For the foregoing reasons and those set forth in Microsoft Corporation's petition, the writ should issue.

Respectfully submitted.

Vizcaino III issued, the Ninth Circuit's determinations concerning the status of temporary employees' common law employment status would not apply to the SPP claims. (Opp'n at 25 n.17.)

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